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Daily News

## Supreme Court Delays Consideration Of Superfund Cost Recovery Case

Posted: September 28, 2012

The Supreme Court has postponed until Oct. 5 its consideration of a petition of *certiorari* by chemical manufacturers to review the availability of Superfund cost recovery mechanisms for private parties who have entered into consent decrees with the government for cleanup response costs.

At the same time, the petitioners in the case, chemical manufacturers Solutia and Pharmacia Corp., have filed a reply brief, arguing a recent decision by the U.S. Court of Appeals for the 7th Circuit -- issued after their petition was filed -- underscores their contention that the question in the case over available cost recovery mechanisms "is causing confusion," which the petitioners want the high court to clarify, and making parties reluctant to conduct cleanups.

The Supreme Court was originally scheduled to confer Sept. 24 on whether to accept a petition in *Solutia, et al. v. McWane, Inc., et al.* But the court has now rescheduled that consideration to Oct. 5.

The petitioners are attempting to win high court review of a case centered on the availability to private parties of the Superfund law's section 107 cost recovery mechanism. The petitioners are making the appeal despite the lack of a conflict among appellate courts, which is often a key factor weighed by the high court in deciding to accept a case for review.

Several appellate court rulings have restricted potentially responsible parties (PRPs) from making cost recovery claims under section 107 of the Comprehensive Environmental Response, Compensation & Liability Act (CERCLA), also known as Superfund law, against other parties. But the petitioners are [urging the Supreme Court](#) to settle what they say is "extensive confusion" among courts, PRPs and the government on the extent PRPs can use section 107 to recoup costs they have incurred for conducting a cleanup under a consent decree.

At issue in the case is an attempt by the petitioners to reverse a ruling by the 11th Circuit, which blocked the companies from pursuing cost recovery claims under section 107. The companies had entered into a consent decree with EPA for cleanup responsibilities for contamination related to polychlorinated biphenyl (PCB) production in Anniston, AL, and subsequently are seeking to recover costs from other parties. But the 11th Circuit limited the petitioners to bringing contribution claims under section 113(f) of the law.

The petitioners, however, see section 107 as their only avenue to recover costs because the defendants in the appellate case, having settled their liability with the government, are immune from being sued under section 113 due to the contribution protection afforded to them under that section for parties who have settled their liability.

If the high court takes the case, it could address a question left unanswered by the Supreme Court in its 2007 decision in *United States v. Atlantic Research* when it found that section 107 -- cost recovery provisions typically used by government agencies -- could be employed by private parties to recoup cleanup costs. While it held that a PRP that had paid cleanup costs but not been sued could seek section 107 cost recovery against another PRP, it "reserved the issue of whether a PRP that had incurred response costs pursuant to a settlement (e.g., a consent decree or administrative order) could recover under [section] 107(a)," according to the companies' *cert* petition.

The *Atlantic Research* ruling came after the high court created a firestorm in 2004 in *Cooper Industries v. Aviall* when it ruled that liable parties cannot sue to recoup cleanup costs under section 113 of CERCLA -- the usual authority for bringing such lawsuits -- unless they had first been sued by the government. That ruling raised fears among liable parties that it would undercut efforts to promote voluntary cleanups by PRPs.

The *cert* petition asks the high court to answer the question of whether, under CERCLA, "a party who incurs response costs conducting a cleanup under a consent decree may pursue a cost recovery claim under [section] 107(a)(4)(B) or is limited to a contribution claim under [section] 113 (f)(3)(B) as its exclusive remedy?"

In part, the petitioners argue that "the question presented is causing extensive confusion among the courts, parties considering entering into agreements to conduct cleanups, and the United States."

### **Petitioners Cite Ruling**

In their [reply brief](#) filed Sept. 10, the petitioners attempt to bolster their arguments by pointing to an Aug. 3 ruling in *United States v. NCR Corp.* in the 7th Circuit, issued after their petition was filed.

In *NCR*, the appellate court affirmed a lower court's decision to reject the apportionment of cleanup liability for PCBs in Wisconsin's Lower Fox River, compelling it to comply with a government-ordered remediation before NCR's liability on the merits had been decided.

While the 7th Circuit did not rule on the section 107 issue, the court made reference to it, saying that the Supreme Court in *Atlantic Research* "intimated" that sections 107 and 113 "may not always be mutually exclusive."

The 7th Circuit's statements on the issue "intimate that the Seventh Circuit may be leaning towards allowing parties who incur response costs under consent decrees to pursue [section] 107(a) cost recovery claims," the petitioners say in the reply brief.

"Certainly the Seventh Circuit indicated that the issue is causing confusion," the petitioners argue.

The petitioners go on to say that the plain language of section 107 allows for a cost recovery, and is not preempted by section 113, noting as the 7th Circuit indicated, that to some degree these two sections overlap.

Further, the petitioners say that denying the 107 claim because the petitioners incurred response costs under a settlement "allows EPA to bargain away rights provided by the plain language of CERCLA and retained in the Partial Consent Decree ('PCD') entered into by the Petitioner" and EPA.

"If the Eleventh Circuit's decision stands, the government will be rewarded for repudiating the PCD and

Petitioners will be punished for agreeing to clean up Respondents' contamination," the petitioners say.

"Decisions denying access to cost recovery are creating situations where parties are attempting to avoid cleanups, like in *NCR*, and are unwilling to enter into agreements with EPA to conduct cleanups," they go on to say. "Following CERCLA's plain language avoids this and, regardless of what 'EPA concluded after exhaustive review,' protects Petitioner's rights to pursue their cost recovery claims and have a court decide their claims on the merits."

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